

Decision 02-04-062

April 22, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The Office of Ratepayer Advocates,

Complainant,

vs.

Pacific Bell Telephone Company (U 1001 C),

Defendant.

Case 00-08-053  
(Filed August 25, 2000)

**ORDER DENYING APPLICATION FOR REHEARING OF  
DECISION 01-08-067, AND VACATING DECISION 01-12-026,  
TO DISSOLVE THE STAY**

**I. SUMMARY**

On August 29, 2001 Decision (D.) 01-08-067, which we issued on August 23, 2001, was mailed. The decision became immediately effective upon its issuance. On September 28, 2001, Pacific Bell Telephone Company (Pacific) filed an application for rehearing and a request for stay of certain Ordering Paragraphs (OP) of the Decision, which Pacific later modified to pertain solely to OP No. 5. On December 11, 2001, by D. 01-12-026 we granted Pacific's request for a stay of OP No. 5 until further order. By this order we dissolve the stay order granted by D.01-12-026 and deny Pacific's application for rehearing of D.01-08-067.

**II. BACKGROUND**

Decision 01-08-067 arises from a complaint filed with the Commission by its Office of Ratepayer Advocates (ORA) against Pacific. At issue

is Pacific's practice of placing an advertisement on customers' telephone lines when a dialed number is busy. That advertisement or prompt solicits the caller with the following message: "[f]or 95 cents, let Repeat Dialing call you back when the line is free."<sup>1</sup> Repeat Dialing is a tariffed service that can be activated by pressing the number 66 and the star key on the telephone pad when a customer desires to redial a number.<sup>2</sup> To activate the advertised service (known as "Prompted Repeat Dialing"), the caller has to code in (i.e., press or dial) the number 3 following the prompt. A \$0.95 service fee is applied if the caller uses the code. Customers that already subscribe to Pacific's Repeat Dialing can press the 3 key to activate the service following receipt of the prompt but would not receive any additional charge (i.e., they do not have to pay the 95-cent per use activation fee).<sup>3</sup>

By D.01-08-067 we found that the prompt that interrupts the busy signal and plays the recorded advertisement, coupled with Repeat Dialing, is a new, non-tariffed service "that functions substantially differently from Repeat Dialing," and that "[t]he prompt portion of Pacific's Repeat Dialing service is an unsolicited sales message ...." (D.01-08-067, at 33 Finding of Fact Nos. 5 – 7;

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<sup>1</sup> About one second after a caller hears a busy signal, the caller receives the recorded message instead of the traditional continuous busy signal. Thereafter, if the caller presses the 3 key s/he can activate the function which will automatically notify the caller (via a call back) when the number that was busy becomes free and will simultaneously redial the call placed to the formerly busy number). If a caller does that, s/he incurs a fee of \$0.95 for the service.

<sup>2</sup> Pacific's tariff for Repeat Dialing provides: "Repeat Dialing ... permits the customer to have calls automatically redialed when the first attempt reaches a busy number. The line is checked every 45 seconds for up to 30 minutes and alerts the customer with a distinctive ringing pattern when the busy number and the customer's line are free. The customer can continue to make and receive calls while the feature is activated."

<sup>3</sup> Repeat Dialing service is also available from Pacific to all customers at any time they encounter a busy signal, without subscribing to the service, on a per use basis. By coding in or pressing 66 and the star key, any customer can activate the service, for a fee of \$0.95 per use, "to automatically redial the last number called from his or her telephone. The customer can do so whether the call was answered, unanswered, or busy." (D.01-08-067, at 33 Finding of Fact No. 1.) When Pacific first offered Repeat Dialing service it was on a subscription-only basis, but later it offered it on a pay per use basis as well (currently, for a fee of 95-cents per use).

and *id.*, at 35 Findings of Fact Nos. 19 and 21.) The evidence additionally established that Pacific provided the recorded prompt without first having obtained the affirmative consent of the customer, and/or without the caller activating the prompt to play. (*Id.*, at 33-34 Finding of Fact Nos. 8, 16.)<sup>4</sup> Although we determined that “Pacific’s implementation of Prompted Repeat Dialing violated Pub[lic] Util[ities] Code §451, §454, §491, §495, §702, §2889.4, GO 96-A, and its Tariff Schedule A.2” (*id.*, at 36 Conclusion of Law No. 4), we found that “[m]onetary penalties against Pacific should not be imposed under the specific facts presented here, both because Pacific discussed its Prompted Repeat Dialing service with the Commission staff prior to its implementation and because this case presents an issue of first impression as to the degree an existing service needs to change to constitute a new service,” (*Id.*, Conclusion of Law No. 11.)

However, the evidence supported our finding that among the customers who experienced the prompted message were residential customers who pay \$0.28 extra per month for non-published services. (*Id.*, at 35 Finding of Fact No. 20.) Accordingly, we determined that “[b]y paying extra to be non-published customers, these customers have affirmatively denied Pacific permission to contact them by the prompt or other means for solicitation purposes.” (*Id.*, Finding of Fact No. 22.) We additionally found that those non-published customers who subscribe to Repeat Dialing, like other customers, did not give Pacific permission to have prompted Repeat Dialing placed on their telephone lines. (*Id.*, Finding of Fact No. 24.) We ordered Pacific to provide a refund to all non-published residential customers of \$0.28 per month for each of those customers for each month that Pacific deployed Prompted Repeat Dialing on their telephone line without their

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<sup>4</sup> “Pacific shifted the burden on customers to affirmatively call Pacific if they wanted the prompt removed, but did not provide a bill insert that a customer could return in order to block the feature.” (*Id.*, at 43 Finding of Fact, No. 17.)

express consent. (*Id.*, at 38 Ordering Paragraph No. 5; see also, *id.*, at 36 Conclusion of Law No. 5.)

We further determined that Pacific may obtain the customers' permission to continue deploying the prompt on their lines, by providing all of its customers with a separate written request seeking their written authorization for the prompt. (OP Nos. 3 and 4; Conclusion of Law Nos. 7-8.) We also ordered Pacific to file an advice letter with separate tariff sheets for Prompted Repeat Dialing on a subscription and per use basis if it chose to continue the service.

### **III. DISCUSSION**

By D.01-08-067 we found that Pacific violated numerous provisions of the Public Utilities Code, as well as General Order 96-A, through its implementation of PRD; however, for the reasons articulated in the decision, we did not assess any penalties for those violations. Pacific, in its application for rehearing takes issue with our finding that PDR is a new service and our order that Pacific provide refunds to those residential non-published customers whose telephone service included the PDR service during the period of time that Pacific implemented PRD without having obtained the consent of those customers. The refunds are based on Pacific's violation of its tariff with those customers.

Although Pacific contends that PRD is not a new service but an enhancement of its tariffed Repeat Dialing service, the evidence established that PRD "functions substantially differently from Repeat Dialing service." (D.01-08-067, at 12, and 33 Finding of Fact No. 6.) In addition, the evidence established that PRD is a new service. (*Id.*, Findings of Fact No.7 and 19.) We clearly concluded that the evidence established that a busy signal is a basic component of "plain old telephone service," and we found that Repeat Dialing service does not affect the traditional busy signal, whereas PRD does. (*Id.*, at 11.) Further, the evidence established that a customer must chose to use the Repeat Dialing service, whereas

with PDR the prompt is played without the customer's affirmative choice. Our conclusion that the advertisement in conjunction with Repeat Dialing in PDR is distinct from Repeat Dialing is supported by substantial evidence. (*Id.*, at 12.) Pacific has not shown that finding constitutes legal error. (Pub. Util. Code, § 1757.)

The evidence before us establishes that Pacific violated numerous provisions of the Public Utilities Code through its implementation of PRD. (D.01-08-067, at 36 Conclusion of Law No. 4.) However, we did not assess any penalties for those violations. Pacific contends that our findings of violations are, nonetheless, unwarranted because certain staff did not inform Pacific that PDR is a new service. As we stated in the decision, “[a]lthough utilities’ discussions with staff prior to implementing a new service can be useful ... the staff does not speak for the full Commission.” (*Id.*, at 31.) Pacific conversation(s) with staff do not excuse it from complying with laws, orders, rules and regulations. In addition, Pacific argues that the prompt is an enhancement of its already tariffed Repeat Dialing service; however, for all the reasons we set forth at length in D.01-08-067, there is ample evidence supporting our finding that PDR is a new service, distinct from Repeat Dialing, and as such, Pacific is required to obtain the Commission’s authority before implementing the new service. Pacific’s argument that the findings of violations are unwarranted is without merit.

Pacific claims that the refund order is punitive and that the Commission’s reasoning for ordering the refund is flawed. By D.01-08-067 we found that Pacific, pursuant to its tariff, is prohibited from contacting residential non-published customers for unsolicited sales efforts and that the advertisement component of PRD was an unsolicited sales effort that its non-published customers had not consented to receive. These non-published customers pay an extra \$0.28 per month to be free from unsolicited service efforts. (D.01-08-067, at 30.) In

finding that Pacific violated its tariff with all non-published residential customers, we directed Pacific “to refund to these customers \$0.28 per month for each month that Pacific deployed Prompted Repeat Dialing on the customers’ line without their express consent...” (*Id.*, at 30-31; see also, *id.*, at 38 Ordering Paragraph No. 5.) Pacific contends that the refund order is “bad policy.” An application for rehearing is not the proper vehicle to argue policy. Pacific has not established that our order is legally erroneous. (Pub. Util. Code, § 1732; Commission Rules of Practice and Procedure, rule 86.1.) Pacific complains that a customer entitled to a refund by the order may not have heard the prompt. However, the point is that Pacific had no authority, either from this Commission, nor from the affected customers, to play an unsolicited advertisement on their lines in place of the busy signal and that in so redesigning its system to play the prompt, it violated a specific agreement (its tariff) with those customers, who had held up their end of the bargain by paying Pacific’s monthly charge of \$0.28 per month for the service.

The Commission can order refunds whenever it finds after a hearing, among other things, that the rates demanded, charged or collected by any public utility in connection with any service affecting such rates are unlawful. (Pub. Util. Code, § 728.) Here we ordered refunds only to non-published customers on the premise that they had not authorized Pacific to contact them and that they have been paying a fee for a service that does not permit Pacific to contact them. Substantial evidence supports our finding and the refund order is proper. By D.01-12-026, in response to Pacific’s request, we stayed OP No. 5 of D.01-08-067 until further order. Having thoroughly reviewed Pacific’s application for rehearing, we find ample good cause to dissolve our order staying Ordering Paragraph No. 5 and by this order we vacate D.01-12-026. Pacific has had ample time since the issuance of D.01-08-067 to contemplate its refund plan. No later than 20 days from the effective date of this decision, Pacific shall fully comply with OP No. 5 of D.01-08-067.

Finally, Pacific contends that neither Public Utilities Code section 309.5 nor section 1702 authorize our Office of Ratepayer Advocates to file a complaint before the Commission. Pacific has repeatedly raised this argument in the underlying proceeding. For the reasons set forth in the Administrative Law Judge's December 2001 ruling on this question, which we set forth in D.01-08-067, we authorize ORA to file complaints before us. (D.01-08-067, at 8-9.) Pacific's argument that ORA is not authorized to file a complaint before the Commission is without merit.

**THEREFORE, IT IS ORDERED:**

1. The Application for Rehearing of Decision 01-08-067 filed by the Pacific Bell Telephone Company is denied.
2. The order staying Ordering Paragraph No. 5 of Decision 01-08-067 is dissolved and Decision 01-12-026 is vacated. Pacific's request for stay is denied.
3. Pacific shall comply with Ordering Paragraph No. 5 of Decision 01-08-067 no later than 20 days from the effective date of this order.
4. This proceeding is closed.
5. This order is effective today.

Dated April 22, 2002, at San Francisco, California.

LORETTA M. LYNCH  
President  
CARL W. WOOD  
GEOFFREY F. BROWN  
MICHAEL R. PEEVEY  
Commissioners

I dissent.

/s/ Henry M. Duque  
Commissioner